No. 21597

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD L. DEHART and PHOEBE D. DEHART, his wife, d/b/a DE HART OIL COMPANY,

Appellants,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

On Appeal From The Judgment Of The United States District Court For The Western District Of Washington, Northern Division

The Honorable William T. Beeks, Judge

APPELLEE'S BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Texts

Rules

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APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

The jurisdictional statement in appellants' opening brief is correct, except that the district court's final decision appears on page 382 of the transcript of record, not page 78. Diversity of citizenship jurisdiction more fully appears from the petition for removal and the answer herein. (Tr. 1-3, 18-19.)

STATEMENT OF THE CASE

Appellants' statement of the case is misleading. It fails to state the dispositive question involved on this appeal, and indeed the point is not intelligibly presented at any place in appellants' brief.

This action for breach of contract was filed by Richard L. DeHart and Phoebe D. DeHart on December 20, 1965 in the Superior Court of the State of Washington in and for the County of Snohomish. (Tr. 6.) The suit was thereafter removed to the United States District Court for the Western District of Washington by petition of defendant-appellee Richfield Oil Corporation (hereafter "Richfield") upon the ground of diversity of citizenship. (Tr. 1.) Richfield filed its answer on January 7, 1966. (Tr. 18.) Appellants (hereafter "the DeHarts") were subsequently granted leave to amend their complaint (Tr. 237), and did so by the filing of an amended complaint on September 15, 1966.* (Tr. 241.) The amended complaint was answered on September 26, 1966. (Tr. 261.)

Among the defenses raised in Richfield's answer is the contention that the claims alleged by the DeHarts were discharged and extinguished in a written release of all claims executed by them in connection with settlement of a prior lawsuit between the parties. (Tr. 21-25; 264-68.) A motion for summary judgment was made on the ground that there exists no genuine issue for trial as to any material fact relating to this affirmative defense. (Tr. 320.) The district court held that the release signed by the DeHarts had discharged and extinguished the claims

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* This amendment, solely to add an additional element of alleged damage, was occasioned by the district court's dismissal of a virtually identical case which appellants filed in the state court following removal of the present action. The latter-filed case was an obvious attempt to thwart the district court's diversity jurisdiction through the device of naming as defendant "Rocket Oil Company," a non-incorporated division of Richfield, and alleging that non-entity to be a citizen of the State of Washington. Richfield appeared and successfully removed the case, which became Action No. 6703 on the files of the district court for the Western District of Washington. An appeal was taken from the subsequent dismissal of that action (No. 21596), but it has evidently been abandoned.

set forth in their amended complaint and that appellants had failed to raise any genuine factual issue with respect to the applicability or validity of the release. Summary judgment accordingly was granted. (Tr. 382.) The primary and dispositive question presented by this appeal is whether that ruling by the court below was correct.

SUMMARY OF ARGUMENT

In the argument which follows it will be shown that the written release of all claims concededly executed by the DeHarts is unambiguous and on its face clearly applies to and has extinguished the claims sought to be set forth in this action. Appellants have alleged no specific facts which, if true, might tend to support a finding that the release is invalid or void. The arguments which they make in this respect, all raised for the first time in this court, are stated in terms of legal conclusions, not facts, and are patently without merit. The DeHarts' principal contention — that they did not authorize the prior settlement agreement providing for release and discharge of all claims — has been put at issue and actually litigated in a previous suit between the parties. The court in that action expressly found to the contrary. Its judgment has long since become final and is conclusive on the point. As a matter of law therefore, on the undisputed record, Richfield was entitled to summary judgment.

Appellants' other specifications of error will next be considered. It will be pointed out that objections to appellants' interrogatories were properly sustained and that their motion for production of documents was properly denied. In any event, these rulings had no bearing on appellants' ability to respond to the motion for summary judgment. Finally, although the point need not be considered by this Court, it will be shown that Richfield's

motion to strike plaintiffs' jury demand was well-taken and necessarily granted.

ARGUMENT

I.

THERE ARE NO TRIABLE ISSUES OF FACT IN THIS CASE AND SUMMARY JUDGMENT WAS THEREFORE PROPERLY GRANTED.

A. Background: The Prior Litigation.

The following facts form the basis of the ruling below. They appear from the pleadings and other papers on file in the district court and from the affidavits filed in support of the motion for summary judgment. Not one of these facts has been contested by appellants.

On October 5, 1960, appellants herein, Richard and Phoebe DeHart, together with certain corporations wholly owned by them, commenced an action in the United States District Court for the Western District of Washington against Richfield Oil Corporation, appellee herein, alleging violations of the federal antitrust laws (Civil Action No. 5145). On March 10, 1964, after completion of extended discovery and other proceedings in that action, plaintiffs and defendant, through their counsel of record, entered into a written "Memorandum of Settlement Agreement." (Tr. 27, 269.) The settlement agreement was made "in full settlement of all claims" held by plaintiffs against Richfield and vice versa, and provided, among other things, for a substantial reduction of the DeHarts' then indebtedness to Richfield and for dismissal with prejudice by Richfield of actions then pending to collect sums owing by the DeHarts for past purchases of petroleum products and to foreclose under a mortgage it held as mortgagee on plaintiffs' property. (Tr. 358-60.) The agreement further provided for dis-

missal with prejudice by plaintiffs of Action No. 5145 and for the execution of mutual releases of all claims the parties may have had against each other.

Plaintiffs subsequently refused to render the performance required of them under the settlement agreement and as a result Richfield filed a cross-complaint in Action No. 5145 seeking enforcement of the agreement. (Tr. 73, 166.) As appears from the record of that case, plaintiffs defended on the ground that they had not authorized or ratified the settlement agreement in that it departed in certain respects from their instructions to their then attorney of record. (See Pretrial Order, printed in Appendix A hereto.)

The cross-complaint came on for separate trial on November 18, 1964 before the Honorable William T. Beeks. Following the introduction of evidence and argument and submission of the cause, the court found that the DeHarts had instructed and authorized their attorney of record to compromise their claims against Richfield on the terms contained in the settlement agreement and to execute the agreement on their behalf. The court further found that the DeHarts had ratified and confirmed the settlement agreement subsequent to its execution. It was therefore adjudged that the agreement was binding upon the parties and should be enforced by a decree of specific performance, and that the previous case, Civil Action No. 5145, should be dismissed with prejudice. (Tr. 33-36, 275-78.) The court's judgment and decree to this effect was made and entered in said prior action on November 30, 1964. (Tr. 37-39, 279-81.) In the decree the DeHarts were directed to execute all documents required to be executed by them under the terms of the settlement agreement. They did execute the documents, and the settlement was finally concluded in January 1965. (Tr. 334-60.) Plaintiffs took no appeal from the denial

of their motion for a new trial or from the court's judgment and decree, and the same accordingly have long since become final. (Tr. 75-76, 166.)

One of the documents signed by the DeHarts in connection with the settlement was a Release of All Claims (Tr. 344-46), and that release is the basis of the summary judgment in this case. In the release "Richard L. DeHart and Phoebe B. DeHart, individually, and doing business as DeHart Oil Company" acknowledged full and complete satisfaction of and released and discharged Richfield Oil Corporation "from any and all claims, demands and causes of action of whatever kind or nature, whether known or unknown, or suspected or unsuspected" which plaintiffs then or at any time prior thereto owned or held against Richfield. (Tr. 344.)

B. There is No Genuine Fact Issue as to The Applicability or Validity of the Release and as a Matter of Law the Conclusion Follows That The Obligations Sought to be Enforced in this Action Were Extinguished by It.

The release was executed by the DeHarts on December 18, 1964. (Tr. 345.) Their Richfield distributorship commenced by agreement with appellee almost nine years previously, in early 1956. (Tr. 242, 263.) The distributorship was terminated by mutual agreement on or about October 15, 1960, shortly after filing of the antitrust suit, Action No. 5145, and Richfield has had no subsequent business dealings with the DeHarts. (Tr. 263, 351-52.) Appellants' amended complaint in the present action is concerned solely with promises purportedly made by Richfield to the DeHarts in connection with their distributorship and alleged breaches thereof during this period. (Tr. 241.) Indeed, it is quite plainly an effort to state under a new legal theory essentially the same grievances

as were involved in the earlier case. It follows therefore that the claims asserted in the present action accrued long before the DeHarts signed the release, and were discharged by that release unless it is inapplicable or unenforceable.

There is no genuine issue as to any material fact affecting either the applicability or enforceability of the release. Prior to filing its motion for summary judgment, Richfield sought to ascertain the DeHarts' position in this respect with a set of interrogatories directed to the issue. The DeHarts were asked to state whether they contended the release was inapplicable or invalid, and, if so, to specify the grounds upon which the contention was based and to state in reasonable detail all facts which plaintiffs intended to prove at the trial in support of any such contentions. (Tr. 77.) In their answers to these interrogatories (Tr. 173) the DeHarts did contend that the release was invalid, on the following grounds: "duress, coercion, lack of consideration and that it is inequitable to plaintiffs herein." (Tr. 174.) However, no facts in support of this contention were set forth in the answers to interrogatories. Instead, various conclusions and legal arguments were advanced based upon aspects of the prior proceedings. (Tr. 175-78.) In substance, these were the points urged subsequently in opposition to Richfield's motion for summary judgment. (Tr. 364.) The opposing affidavit of appellants, however, like the answers to interrogatories, did not set forth any pertinent specific facts showing a genuine issue for trial, but rather consisted solely of hearsay assertions and conclusions. (Tr. 366.) This brief does not consider the contentions asserted by appellants in the court below, since they are not advanced in support of the present appeal. These points are discussed fully in a trial memorandum of appellee which is included in the transcript of record. (Tr. 327-30.)

In their opening brief, appellants rely on three previously unmentioned alleged issues of material fact which are said to preclude summary judgment. As a matter of law, none of these purported fact issues is a genuine issue. In addition, appellants' unexplained failure to raise them in the trial court serves as an independent ground for affirmance. *Ring Engineering Co. v. Otis Elevator Co.*, 179 F.2d 812 (D.C. Cir. 1950).

1. The Alleged Issue of Authority

Appellants now assert, first, that there exists a fact issue with respect to the authority of the DeHarts' attorney in the prior action, Civil Action No. 5145, to settle claims other than those specifically involved in lawsuits then pending. (App. Op. Br. 6-7.) As a matter of law, however, that point is resolved against appellants by facts which are undisputed and incontrovertible. The same question was squarely presented for trial and was actually litigated in the previous case. The Pretrial Order therein, printed in Appendix A hereto,* states, in part (p. 3): "The only issue of fact to be determined by the court is whether or not the execution of the "MEMORANDUM OF SETTLEMENT AGREEMENT" of March 10, 1964 was authorized or ratified by plaintiffs."

After trial on this issue, the district court expressly found that the DeHarts had authorized and ratified a settlement of the case "on the terms contained in the

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* Since no issue was raised below by the DeHarts with respect to the claimed lack of authority of their former counsel, the transcript of record herein does not directly show the issue joined for trial in the prior action, although it can be inferred from the findings of fact and conclusions of law and from the judgment and decree entered in that case. (Tr. 275, 279.) At all events, this court may in these proceedings take judicial notice of the records and files of the district court in the previous suit. *Nahtel Corp. v. West Virginia Pulp & Paper Co.*, 141 F.2d 1, 2 n.2 (2d Cir. 1944).

Memorandum of Settlement Agreement" and had instructed their attorney to execute the agreement on their behalf. (Tr. 277.) One of the terms of the agreement — a provision not uncommon in the compromise of lawsuits — was that "the parties will execute a mutual release of any and all claims of whatever character" the parties may have held against each other, except for obligations specifically set forth in the settlement agreement. (Tr. 269.) It is contrary to the undisputed record therefore to assert as do appellants that there has been no adjudication of the authority of their prior attorney to agree to a release of *all* claims as one term of the settlement of the prior litigation. The court's judgment and decree in that matter expressly directed plaintiffs to execute the Release of All Claims implementing the provision quoted above (Tr. 280) and Mr. and Mrs. DeHart did so. (Tr. 344.)

In view of the foregoing, appellants surely cannot be heard in these proceedings to claim that this release, personally signed by them, was unauthorized. Under the rule of *res judicata* known as estoppel by judgment, or collateral estoppel, a question of fact which is put in issue and actually determined by a final judgment of a court of competent jurisdiction cannot later be relitigated by the same parties. The claims asserted in the two cases need not be identical for this result to follow. It is well settled that "even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49 (1897). Accord, *Commissioner v. Sunnen,* 333 U.S. 591, 597-98 (1948); *Riblet v. Ideal Cement Co.,* 54 Wash.2d 779, 345 P.2d 173, 175-76 (1959); Restatement, Judgments § 68. Appellants'

reliance on *Symington v. Hudson,* 40 Wash.2d 331, 243 P.2d 484 (1952) (App. Op. Br. 10) is misplaced, as that case involved the phase of the doctrine of *res judicata* which governs successive suits based upon the same cause of action and which has a wider range of conclusiveness, by way of merger or bar.

The central flaw in appellants' opening brief is its failure to come to grips with the Release of All Claims executed by the DeHarts. Indeed, that document is never mentioned in the brief. Instead, appellants seek to create the inaccurate impression that the "settlement" of the first lawsuit related solely to the antitrust violations there alleged. From this false premise, they argue that the judicial determination in Action No. 5145 that the settlement was authorized by the DeHarts can have no collateral estoppel effect in this purported breach of contract action. However, the general release signed by the DeHarts demolishes this contention and makes immaterial the nature of the two lawsuits. The indisputable fact is that in connection with the prior settlement, appellants released and discharged appellee "from any and all claims, demands and causes of action of whatever kind or nature" (Tr. 344), including obviously those for breach of contract. Appellants cannot now avoid the effect of that agreement simply by ignoring it.

2. The Alleged Issue of Intent

Appellants also contend that the scope and application of the release is a question of fact "based on the intentions of parties who signed it." (App. Op. Br. 8.) Again, appellants have failed to set forth any specific facts relating to intent showing this to be a triable issue. In any event, however, the meaning and effect of the release are plain from its face, and extrinsic evidence of the parties' intention would be inadmissible as a matter of law. In *Combined Bronx Amusements, Inc. v. Warner*

Bros. Pictures, Inc., 132 F.Supp. 921 (S.D.N.Y. 1955), an appeal from the granting of a summary judgment, the court said with respect to similarly-phrased releases: "The releases are in terms clear and unambiguous; oral testimony is neither necessary nor admissible when construing them." (132 F.Supp. at 921.) Accord, *Beaver v. Estate of Harris,* 67 Wash.2d 621, 627-28, 409 P.2d 143, 147 (1965).

3. The Alleged Issue of Consideration

Lastly, appellants state, cryptically and without any reasoning or further comment, that "the adequacy of the consideration given for the 'settlement' is also unresolved."* (p. 8.) In the district court, appellants set forth no facts showing this to be a triable issue, and no such facts are referred to in appellants' opening brief in this Court. Moreover, appellants have cited no authorities, and we are aware of none, which would permit a judicial inquiry into the adequacy of the consideration given for the release executed by the DeHarts. Finally, the nature of the substantial consideration passing from Richfield to the DeHarts in connection with the prior settlement is set forth in detail in the Memoradum of Settlement Agreement itself (Tr. 269) and in affidavits filed in support of the motion for summary judgment. (Tr. 334-60.) These facts are undisputed on the record

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* Presumably this contention is distinct from that advanced during discovery proceedings in the district court that there had been a *failure* of consideration for the release signed by the DeHarts, in that Richfield allegedly had failed to comply with its agreement to execute a release in favor of the DeHarts. (Tr. 176.) This claim was shown to be erroneous in the affidavits filed in support of the motion for summary judgment (Tr. 347-50; 355-57), and evidently has been abandoned. Failure of consideration was also asserted by appellants in response to the motion (Tr. 365), but no supporting facts were set forth in their opposing affidavit. (Tr. 366.)

and fully support the motion to the extent that the consideration point is material at all.

C. Under Controlling Principles, Appellee Was Entitled to Summary Judgment as a Matter of Law.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment

> ". . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The function of summary judgment is to avoid a needless trial, and the procedure is particularly effective with respect to an affirmative defense as to which, as here, the material facts are not subject to dispute because capable of categorical proof. The motion permits a party and the court to cut through the pleadings, which may on their face show formal fact issues, and determine by extraneous material that there is no genuine issue of fact to be tried. When the moving party sets forth facts appearing to support the motion the opposing party has "a duty to come forward in the district court with any additional or controverting facts which would call for a different result." *Warren v. Lawler,* 343 F.2d 351, 358 (9th Cir. 1965). In this connection, a party's unsupported claim of factual dispute is not sufficient to avoid summary judgment. *Specific facts which would be admissible in evidence must be set forth* and all affidavits must "show affirmatively that the affiant is competent to testify to the matters stated therein." (Rule 56(e).) As the court said in *Short v. Louisville & Nashville R. Co.,* 213 F.Supp. 549 (E.D. Tenn. 1962), "the whole

purpose of summary judgment proceedings would be defeated if a case could be forced to trial by a mere assertion that a genuine issue exists, without any showing of evidence." (213 F.Supp. at 550.)

Summary judgments frequently have been granted where a legally sufficient release is asserted by defendant and plaintiff raises no genuine fact issue as to its validity.

Wagoner v. Mountain Savings and Loan Ass'n, 29 F.R.D. 138 (D. Colo. 1961), aff'd 311 F.2d 403 (10th Cir. 1962);

Taxin v. Food Fair Stores, Inc., 287 F.2d 448 (3d Cir.); cert. denied 366 U.S. 930 (1961);

Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 206-07 (9th Cir. 1950); cert. denied 340 U.S. 943 (1951);

Rotberg v. Dodwell & Co., 152 F.2d 100 (2d Cir. 1945);

Mahoney v. McDonald, 38 F.R.D. 161 (E.D. Pa. 1965);

Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc., 132 F.Supp. 921 (S.D.N.Y. 1955).

Summary judgment was properly granted in this action, as it is based on purported claims which appellants for good consideration and with advice of counsel have released and discharged. Appellants' arguments for avoiding the effect of the release are frivolous. As Judge Learned Hand once said in rejecting similarly specious contentions while affirming summary judgment on the basis of a release:

> "The argument is of a piece with the whole action, which has no merit, legally, morally or otherwise.

The interrogatory is objectionable in calling for an opinion and legal conclusion. E.g., *California v. The Jules Fribourg,* 19 F.R.D. 432, 435 (N.D. Cal. 1955); *Fishermen and Merchants Bank v. Burin,* 11 F.R.D. 142, 145 (S.D. Cal. 1951). In response, Richfield could only have repeated the allegations set forth in its affirmative defenses on the point. (Tr. 264-68.) Nothing which might have been said in answer to this question could have helped the DeHarts in sustaining their burden in the summary judgment proceedings to set forth specific facts showing that there is a genuine issue for trial.

The motion for inspection of documents was directed solely to materials alleged to be relevant to appellants' complaint. (Tr. 300, 222-26.) It was properly denied because of the total failure to make the required showing of good cause. In support of the motion plaintiffs filed a statement of points and authorities consisting of nothing more than a quotation of the text of Rule 34 of the Federal Rules of Civil Procedure. (Tr. 303.) There are several reasons why the documents sought by the DeHarts are irrelevant to any issues presented by their complaint, but in view of the nature of plaintiffs' moving papers it suffices to point out, as the Supreme Court has said, that "Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule." *Schlagenhauf v. Holder,* 379 U.S. 104, 118 (1964). And the burden is on the movant to establish good cause. E.g., *Groover, Christie & Merritt v. LoBianco,* 336 F.2d 969, 972 (D.C. Cir. 1964).

B. Appellants' Jury Demand

Appellants' specification as error of the district court's order striking plaintiffs' jury demand will become moot if the summary judgment entered below is affirmed, as

appellee urges. However, for completeness, we consider this final point briefly in closing.

Appellants served their demand for jury herein (Tr. 44) on January 28, 1966 (Tr. 58), concededly too late (Tr. 113), for under the provisions of Rules 38 and 81 they had already waived trial by jury. (App. Op. Br. 13.) The District Court accordingly had no choice but to strike the jury demand (Tr. 123) upon motion by Richfield. (Tr. 53.) Appellants' remedy was to seek to invoke the court's discretionary power under Rule 39(b) to relieve them of their waiver. That rule provides, in part, that "notwithstanding the failure of a party to demand a jury in an action in which such a demand [as provided in Rule 38] might have been made of right, the court in its discretion *upon motion* may order a trial by a jury of any or all issues." (Emphasis added.) Appellants made no such motion and thus failed to take the procedural step expressly necessary to restore the right they here complain of having lost. The authority relied upon by appellants in this respect, *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d 447 (9th Cir. 1960) (App. Op. Br. 13), is completely inapplicable, partly because appellants in that case did make a Rule 39(b) motion.

Furthermore, even had such a motion been made in this action, the only supporting showing in the record is a manifestly insufficient affidavit of appellants' counsel. (Tr. 115.) Discretion under Rule 39(b) is not exercised lightly. This court has indicated approval of the well-established view that "as a matter of judicial administration discretion ought rarely to be exercised to grant a trial by jury in default of a timely request for it." *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d at 449. See 5 Moore, Federal Practice 715-19. The affidavit here said to compel exercise of this discretion simply states that appellants' counsel talked with one of Richfield's attor-

neys "and understood from said conversation that all proceedings either by the plaintiffs or the defendant were stayed by agreement until after the plaintiffs' Petition for Removal [sic] could be heard." (Tr. 115.) The affidavit states no facts which would justify such an understanding, but even accepting it at face value an agreement in these terms could scarcely be reasonably construed as applying to the filing of a jury demand, the deadline for which is fixed by the Federal Rules and not subject to change by stipulation of the parties.

Moreover, it became apparent at the hearing before the district court on appellee's motion to strike the jury demand that the "understanding" alleged in counsel's affidavit was, by his own admission, factually unfounded. The transcript of these proceedings is not included in the record herein solely because of appellants' failure to comply with the provisions of Rule 75(b)* governing designation of the record where appellant chooses to include less than the entire transcript. Under these circumstances, where the reviewing court finds the deficiency in the record material, such a default precludes consideration on appeal of the point involved. *Watson v. Button,* 235 F.2d 235, 237 (9th Cir. 1956).

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* Rule 75(b): "Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and *a statement of the issues he intends to present on the appeal.* . . . If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the issues by the appellant, order such parts from the reporter or procure an order from the district court requiring the appellant to do so. . . ." (Emphasis added.)

CONCLUSION

Appellee respectfully submits that for the reasons advanced herein, and on the authorities cited, the summary judgment granted by the district court was plainly correct and should be affirmed.

Respectfully submitted,

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Attorneys for Appellee
Richfield Oil Corporation

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

RICHARD C. WARMER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF WASHINGTON
NORTHERN DIVISION

RICHARD L. DeHART, PHOEBE B. DeHART, his wife, d/b/a DeHART OIL CORPORATION; DeHART'S SNOHOMISH, INC., a Washington corporation; DeHART'S EVERETT, INC., a Washington corporation; DeHART'S MOUNT VERNON, INC., a Washington corporation and DeHART'S SEDRO WOOLLEY, INC., a Washington corporation,

Plaintiffs,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Defendant.

NO. 5145
PRETRIAL ORDER

As the result of pretrial conference heretofore had, whereat the plaintiffs were represented by Lewis S. Armstrong and Gerald F. Collier, their attorneys, and defendant by Everett B. Clary of O'Melveny & Myers, Frank T. Rosenquist of Graham, Green, Dunn, Johnston & Rosenquist, and Kenneth P. Short of Short, Cressman & Cable, their attorneys of record, the following issues of fact and law were framed and exhibits identified.

JURISDICTION

1. Jurisdiction is vested in this court pursuant to 58 Stat. 731, (15 U.S.C.A. Sec. 15) and 38 Stat. 737 (15 U.S.C.A. Sec. 26).

ADMITTED FACTS

2. The following facts are admitted by the parties:

(a) That on March 10, 1964 William L. Dwyer, who was then one of the attorneys of record for plaintiffs, and Frank T. Rosenquist, who was then and there one of the attorneys of record for defendant, executed a "MEMORANDUM OF SETTLEMENT AGREEMENT" a true copy of which is attached to the defendant's answer and cross complaint and which "MEMORANDUM OF SETTLEMENT AGREEMENT" is marked as defendant's Exhibit 1.

(b) That on or about May 4, 1964 and on or about July 10, 1964 the defendant, through said Rosenquist, delivered to Seattle First National Bank, as escrow holder, all of the documents contained in defendant's Exhibit 2.

DISPUTED FACTS

The plaintiffs contend as follows:

(a) That they did not authorize or ratify the "MEMORANDUM OF SETTLEMENT AGREEMENT", and that the same departs from their instructions to the said Dwyer in that:

1. There were to be mortgages placed on only two of the service stations.

2. The mortgage debt reduction would be in a nontaxable form.

3. Defendant would supply plaintiffs with gasoline and would finance the purchase thereof by plaintiffs.

The defendant contends as follows:

(a) That the plaintiffs authorized and ratified the execution, by William L. Dwyer, their attorney, of defend-

ant's Exhibit 1, the "MEMORANDUM OF SETTLEMENT AGREEMENT".

ISSUES OF FACT

The only issue of fact to be determined by the court is whether or not the execution of the "MEMORANDUM OF SETTLEMENT AGREEMENT" of March 10, 1964 was authorized or ratified by plaintiffs.

ISSUES OF LAW

None.

EXPERT WITNESSES

None.

OTHER WITNESSES

1. On behalf of plaintiffs:
   (a) Richard L. DeHart
   (b) Phoebe B. DeHart
   (c)
   (d)
2. On behalf of defendant:
   (a) William L. Dwyer
   (b) Charles S. Burdell
   (c) Frank T. Rosenquist
   (d) Edward West, Jr.
   (e)
   (f)

EXHIBITS

The exhibits below listed were produced and marked and may be received in evidence without objection:

(a) Plaintiffs' Exhibits:

1. Plaintiffs' Exhibit 1, copy of letter, William L. Dwyer to Charles S. Burdell, dated June 1, 1964.

(b) Defendant's Exhibits:

1. Defendant's Exhibit A, copy of the "MEMORANDUM OF SETTLEMENT AGREEMENT".

2. Defendant's Exhibit B, copy of escrow documents delivered by defendant to Seattle First National Bank.

3. Defendant's Exhibit C, copy of letter of March 23, 1964 from Rosenquist to Seattle First National Bank.

4. Defendant's Exhibit D, copy of letter of March 24, 1964, Edward West, Jr. to Rosenquist.

5. Defendant's Exhibit E, copy of letter of June 16, 1964, Rosenquist to Dwyer.

6. Defendant's Exhibit F, copy of option agreement from plaintiffs to Gull Oil Company, dated April 3, 1964.

The exhibit below listed was produced and marked and may be received in evidence if otherwise admissible without further authentication, it being admitted that said exhibit is what it purports to be:

Plaintiffs' Exhibit 2, miscellaneous handwritten notes of William L. Dwyer.

ACTION BY THE COURT

The Court has ruled that:

(a) In accordance with Rule 42(b), this phase of the case is severed from the anti-trust phase of the case and will be separately tried as a non-jury case on November 17, 1964.

(b) Trial briefs shall be submitted to the Court on or before November 10, 1964, and any reply briefs by November 13, 1964.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signature of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED this 16th day of October, 1964.

/s/ W. T. Beeks
United States District Judge

Form Approved:

/s/ Lewis Armstrong
Attorney for Plaintiffs

/s/ Kenneth P. Short
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